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Information Note

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The Lisbon Treaty and the European Asylum and Migration Policies

On 3 November 2009 the Czech constitutional court ruled the Lisbon Treaty to be compatible with the Czech constitution. Later the same day President Vaclav Klaus has announced he had signed the ratification document. Consequently the Lisbon Treaty (or: EU Reform Treaty) could come into force as of 1 December 2009. Hence it seems to be desirable to make some first reflections on the probable consequences of the treaty for the asylum and migration policies of the European Union and its Member States. This is the aim of this information note.

It should be taken into consideration that the Lisbon Treaty amends the current EU and EC treaties, without replacing them. Therefore we will in future still deal especially with the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

Competence of the Union

Asylum and migration policies have moved from the former “third pillar” to the “Area of Freedom, Security and Justice” where the Union shares the competence with the Member States (Art. 4 para. 2 lit. j, Art. 77 et seqq. TFEU). The previously different legal foundations of the Union’s competence are now combined and further amended by the competence for supporting integration.

“Shared competence” means that in these areas the Union has the preferential legislative competence. The Member States shall become active only to the extent that the Union has not exercised its legal powers (Art. 2 para. 2 TFEU). The competence of the Union is, on the other hand, not unlimited: In accordance to the overriding subsidiarity principle the Union’s institutions shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather be better achieved at Union level. In all other cases they shall leave action to the Member States.¹

Co-decision by the European Parliament as a rule

Consequence of the moving of asylum and migration policies to the “Area of Freedom, Security and Justice” is that in the decision-making processes leading to legal acts in these policy fields the European Parliament must not only be consulted but holds, together with the Council, the legislative power. In a normal procedure the Parliaments debates a proposal of the European Commission and submits their opinion (including amendments) to the Council. If the Council agrees with the Parliament’s opinion the – accordingly amended – draft becomes a legal act. Does the Council not share the Parliament’s view they submit their different opinion (and the

¹ See Art. 5 para. 3 TEU and the Protocol on the Application of the Principles of Subsidiarity and Proportionality in the annex to the Lisbon Treaty.

reasoning) back to the Parliament. Does the Parliament then agree with the Council the Council's version becomes the final text. If Parliament and Council do not find an agreement a compromise must be reached in conciliation proceedings.

Of course, this procedure does not make blockades and political horse-trading impossible. But it also makes it even more necessary than before to establish an effective and sustainable network with Members of the European Parliaments. Contact to them should not only be the job of the "Brussels lobbyists" but also of the activists in the MEPs' home countries because as members of their constituencies they can hold "their" MEPs accountable.

A three-fold set of Fundamental Rights

Even if the Charter of Fundamental Rights (CFR), as adapted on 12 December 2007, was not incorporated into the European Treaties, it has the same legal values as the Treaties (Art. 6 para. 1 TEU). Hence the Charter is an inalienable part of the EU's primary legislation.²

In its Article 18, the CFR expressly regulates that the "right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community". Relevant for advocacy is also the provision in Art. 19 para. 2 CFR where the Charter borrows a regulation from the UN Convention Against Torture and issues a ban on extradition and forced return in cases where there is a threat of torture. In some cases also other rules of the CFR might become relevant such as the respect for family and private life as laid down in Art. 7.

Connected to this is Art. 6 para.2 TEU providing for the accession of the European Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). Once this accession has been formally declared, the Union itself is bound to the regulations in the ECHR as interpreted by the European Court for Human Rights in Strasbourg (the EU Member States, being also Member States of the Council of Europe, are already bound by the ECHR). Therefore the Union's legal acts as well as activities of its institutions (such as the FRONTEX border agency) could be contested in Strasbourg as violating provisions of the ECHR, e.g. the ban on forced return in cases of torture (see Art. 3 ECHR as interpreted in the Strasbourg Court's jurisprudence).

The third part of this set consists of the fundamental rights "as they result from the constitutional traditions common to the Member States" and constitute general principles of the Union's law (Art. 6 para. 3 TEU). It is already settled case law that these common traditions can be used as an important source for interpretation of EU legislation.

Conclusion

The Lisbon Treaty will certainly not solve all problems in the EU asylum and migration policy fields. But the new system gives much more influence of EU decisions on policies on national level and therefore makes networking and a common advocacy strategy on national as well as on EU level more necessary.,

Stefan Kessler

² As the European Court of Justice has ruled on 27 June 2006 in *European Parliament v Council of the European Union* (C-540/03), even when the Charter was not a legally binding instrument it was already an important source for the interpretation of European legal norms because "the Community legislature did ... acknowledge its importance by stating ... that the [Family Reunification] Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights' (para. 38).